83 - 1741

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HYUN JOON CHUNG and
YANG JA CHUNG,

Petitioners,

vs.

IMMIGRATION AND
NATURALIZATION SERVICE.

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(SUPPLEMENTAL APPENDIX)

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SUPPLEMENTAL APPENDIX

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UNITED STATES DEPARTMENT OF JUSTOCE
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

WRITTEN DECISION
OF
THE IMMIGRATION JUDGE

On the basis of a showing that the respondents were the parents of three United States citizen children, one of whom was injured in an accident the year earlier, and that the female respondent needed medical attention that could only be furnished in the United States, the Board of Immigration Appeals on March 24, 1977 granted a motion for reconsideration and remaned this matter for consideration of respondent's application for suspension of deportation.

DISCUSSION AS TO ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

Application for suspension of deportation under Section 244(a)(1) requires that the respondents establish their physical presence in the United States for a continuous period of not less than seven years preceding the submission of their applications, and that they have been persons of good moral character during this entire period and that their deportation would result in extreme hardship to themselves or to their children who are citizens of the United States. Suspension of deportation is a matter of administrative grace, not mere statutory eligibility. The burden of proof is upon the alien to establish not only that he meets all statutory requirements for eligibility, but that he is worthy of discretion in his favor. Moreover the exercise of discretion in a

particular case necessarily requires a consideration of all the facts and circumstances involved.

Respondents are husband and wife. Mr. Chung is 43 years of age and Mrs. Chung is 37 years old. They were both admitted to the United States in 1968 as non-immigrant treaty traders. There is sufficient evidence of record to support the Government's position that they were not entitled to treaty trader status at entry based upon fraudulent documents and misrepresentations made by Mr. Chung to the America Consul in Korea, Exhibit 10. On July 17, 1969, respondents applied for adjustment of status under Section 245 based upon Mr. Chung's claim that he was entitled to non-preference immigarant classification as a member of the professions entitled to a blanket

labor certification as a chemical engineer. On June 10, 1970, the application was denied administratively. After a denial of a motion to reconsider the Service instituted these deportation proceedings by the issuance of an Order to Show Casue on September 7, 1973, I denied respondent's applications for adjustment of status under Section 245, which was then based upon their claiming exemption from the alien labor certification requirements based upon an investment in a grocery store opened April 7, 1971, both as a matter of law and as a matter of discretion. I found that during the course of the deportation proceedings the respondents had testified falsely with an intent to mislead me in regard to their investment. I did however grant them the privilege of

voluntary departure until January 23, 1974. I should note that the record reflects that preparations for their entering business was started at least as early as January 28, 1971. On August 27, 1975, the Board dismissed their appeal, and on July 12, 1976, denied their motion to reopen suspension of deportation because they had not demonstrated that their deportation would result in extreme hardship to any qualifying individual. The Board considered evidence of the female respondent's medical condition which was diagnosed as "papilomatosis". On January 10, 1977 a motion to reconsider was filed with the Board containing addition medical reports regarding Mrs. Chung and one of their children. On March 24, 1977, the motion for reconsideration was granted.

At the remanded hearing Dr. Harvey Paley testified as Mrs. Chung's doctor and a specialist in throat conditions. He described Mrs. Chung's medical condition in layman's terms as the growth of benign lesions or warts in the voicebox and windpipe obstructing her breathing as well as causing her great difficulty in taling. He states that the condition could be fatal if not corrected. He used the new surgical procedure known as laser beam surgery to remove the warts on her voicebox and windpipe. Dr. Paley felt that this new treatment would cut down on the recurrance and severity of of the condition and is the best available treatment at this time. He further stated that the laser beam treatment was not available in Korea as far as he knew in February 1979 when he testified.

The normal treatment in cases similar to Mrs Chung's would be to go into the patient's throat and scrape or pluck the growth out but the growths would likely recur mor frequently. Dr. Paley's conclusion was that the treatment here was superior to treatment available in Korea. Mrs. Chung had been operated on at UCLA medical center using the normal surgical procedures in October 1975, Dr. Paley operated on Mrs. Chung on February 24, 1978, using the laser beam technology. Her examination on February 1, 1979, by Dr. Paley no papillome recurring in the voicebox but having recurred in the widpipe. She was again examined on July 22, 1980, the voicebox was still clear but surgery was needed on the windpipe. Exhibit 7. Dr. Paley was hopeful that further

surgery would clear the condition in the windpipe. He went on to state that there is no known cure for this disease. Respondents also claimed a hardship because of an automobile accident in wiich one of their children was severly injured in January 1976. No further evidence has been presented on his medical condition I assume therefore that he has been cured.

Respondents sold their grocery store not long after may denial and opened a sewing machine company called Hyjo Fashions Sewing Company. In January 1979 they were the site of an area control survey by immigration officers. Eleven of their fifteen employees were apprehended for being illegally in the United States. Respondents still own that

business and the male respondent since October 27, 1978, is a partner and owns 53% of Amko Engineering Company which does sub-contracting work for Hughes Aircraft and other defense contractors. He claims his interest is worth approximately $150,000.00. A report of investigation conducted June 25, 1979 indicated that 5 of the 11 arrested at Hyjo were still employed by the company. In addition, while conducting the background investigation it was ascertained that the respondents had employed an undocumented alien maid. I tried to ascertain during the course of these proceedings how the respondent as an illegal alien in the United States under deportation proceedings could obtain sub-contracting work from the

defense industry. I was not given further information on that point. In addition to their business interests the respondents own a home which they have an equity of at least $90,000.00 in. They have three United States citizen children. They claim the children do not speak Korea, although the official Korean interrupter was used during the course of these proceedings.

Extreme hardship is not a definable term of fixed and inflexible meaning. The elements to establish extreme hardship are dependent upon the facts and circumstances of each case. Among the factors to be considered are: the length of respondent's presence over the minimun requirements of seven years, respondent's age both at time of entry and at the time of application for relief,

the presence of United States citizen children, family ties, respondent's family ties outside the United States, the conditions in the country or countries to which the alien is returnable and the extent of respondent's ties to such countries, the financial impact of departure from this country, significant conditions of health particularly when tied to an unavailability of suitable medical care in the country to which respondent will return, significant and unusual community ties in this country, the possibility of other means of adjustment of status for future entry into this country. The significance of any specific consideration will of necessity be dependent upon the entire factual framework of the case in which it

arose and the presence or absence of one factor will ordinarily not be determinative. Urbano De Malaluan v. INS, 577 F. 2d 589 (9th Cir 1978). Matter of Anderson, 16 I&N Dec. 596. Recently the United States Supreme Court in considering Section 244, noted with favor the comments of Judge Goodwin of the United States Circuit of Appeals for the Ninth Circuit when he observed in a dissenting opinion to the Court's decision to reopen that "any foreign visitor who has fertility, money, and the ability to stay out of of trouble with the police for seven years can change his status from that of tourist or student to that of permanent resident without the inconvenience of immigrant v quotas. This stratedy is not fair to those waiting

for a quota, INS v. Wang, 101 S.CT. 1027. Subsequently on March 11, 1981, the United States Court of Appeals for the First Circuit supported the Board's determination that four children born while the respondent was knowingly in the United States illegally would be considered as an adverse factor. Vaughn v INS, -F.2d-(1st Cir. 1981). I find that the respondent have established their physical presence in the United States for the requisite perior of time. I further find that they have from the begining of their preparation to enter the United States up until the present time engaged in a course of conduct meant to deceive, to misrepresent, and to fabricate in order to enter the United States and to remain in this country by whatever means available. Respondents

have involved themselves in the shady business of employing illegal aliens and retaining those illegal aliens on thier payroll even after Service officers brought the situation to their attention. They have consistently given false testimony and have shown a creativity and ability to survive and to prosper so that I have no doubt that they could continue surviving and prospering were they be required to return to Korea. I am cognizant of the medical condition of Mrs. Chung; but it is managable and it can be controlled both by the new techniques of Dr. Paley and by the older techniques available in Korea. I find that their applications do not establish extreme hardship to themselves and I find that they have not

established extreme hardhip on the basis of their four United States children who were born after the respondent ware knowingly in this country illegally. I am sure the respondents will be very able to take care of these childrein in Korea.

The course of conduct that I have recited in this decision convinces me that as a matter of administrative discretion respondents should not be entitled to favorable administrative consideration.

ORDER: IT IS ORDERED that thier application for suspension of deportation be and the same are hereby denied.

Jay Segal
Immigration Judge

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